No. 91-1774

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ROBERT LILLIS, LEONARD PASTORE, ANTHONY DiLULLO
and MARY FISH-MacDONALD,
Petitioners,

v.

ANTHONY GOLINO,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Given (a) the substantial showing in the present case that the petitioner police officers' presentations in support of probable cause contained significant misstatements and omissions, and (b) the limitations on the respondent's ability to present his own evidence and to gain access to undisclosed significant facts known to the police in order to cross-examine the state's witnesses, did the Second Circuit err in concluding that the prior state hearing did not provide the respondent a full and fair opportunity, for collateral estoppel purposes, to litigate the issue of probable cause.

2. Given (a) the information that was misrepresented or remained undisclosed in the respondents' presentations in support of probable cause was not immaterial to that question as a matter of law, and (b) the evidence that the petitioners' nondisclosure of the exculpatory information was deliberate, did the Second Circuit err in concluding that it could not rule as a matter of law that it was objectively reasonable for petitioners to believe there was probable cause for the arrest and prosecution of the respondent.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Second Circuit's opinion in this case. That opinion is reported at 950 F.2d 864 (1991).

STATEMENT OF THE CASE

The Petition for Certiorari is based on a denial of a motion for summary judgment. The respondent's version of the facts are included here, along with the history of the case, as an understanding of the facts concerning the police investigation are important to the issues of the materiality of the omissions and false statements in the warrant affidavit and the objective reasonableness of the officers in initiating Mr. Golino's prosecution.

A. History Of The Case

On July 16, 1973, Concetta "Penny" Serra, then 21 years old, was stabbed to death in the Temple Street parking garage in New Haven, Connecticut. A massive police investigation followed but produced no arrest. In 1976, when the New Haven police detective who had been chiefly responsible for the continuing investigation, retired, the investigation became largely dormant. In November, 1979, Mary Fish, who later received her detective badge in December, 1983, was assigned to the Serra investigation. For reasons to be discussed below, Fish came to view Anthony Golino as the prime, perhaps the only, suspect in the Serra killing as early

as June, 1980.[1]

On July 3, 1984, Detective Anthony DiLullo submitted an application for an arrest warrant and supporting affidavit to Connecticut Superior Court Judge James Higgins seeking Anthony Golino's arrest for the murder of Penny Serra. Judge Higgins signed the arrest warrant and Mr. Golino was arrested the same day.

In August, 1984, a probable cause hearing was held before Superior Court Judge Frank Kinney. Counsel for Mr. Golino was allowed to cross-examine the State's witnesses but was not permitted, despite his request, to put on evidence. Further, although Mr. Golino's counsel also sought pre-hearing access to the police file, this request was denied. At the conclusion of the hearing, Judge Kinney found probable cause and Mr. Golino was bound over for trial.

In April or early May, 1987, with trial imminent, the State's motion to compel Mr. Golino to submit to a blood test was granted. It was known that Penny Serra's killer had type "O" blood. The blood test showed that Mr. Golino had type "A" blood. After receiving the result of the blood test, Assistant State's Attorney Mary Galvin moved to nolle the charges against Mr. Golino. On Mr. Golino's motion, they were dismissed on May 15, 1987.

In January, 1988, this Section 1983 action was brought against the City of New Haven, its then Police Chief William

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[1]Detective Fish so testified at the probable cause hearing before Judge Kinney. *HPC transcript, p. 863.* Ms. Fish was not married at the time she was given the Golino assignment. She later married and adopted her husband's name of MacDonald. For the sake of consistency, she will be referred to as Detective Fish throughout this brief.

Farrell, Joyce Carasone Lupone[2] (Mr. Golino's former wife), four named New Haven police officers who had actively participated in the post-1979 Serra investigation,[3] and a number of John and/or Mary Does. The complaint claimed that Mr. Golino's federal constitutional rights had been abridged by the defendants through conduct amounting to malicious prosecution, arrest with excessive force, and a variety of intentionally abusive "investigative" techniques. Further, Mr. Golino claimed to have been the victim of a civil rights conspiracy between various officers of the New Haven Police Department and Joyce Carasone, the purpose of which was to secure his wrongful arrest and prosecution for the murder of Penny Serra. Chief Farrell and the City of New Haven were claimed to be liable for maintaining policies and practices resulting in the harms complained of, and for conduct amounting to deliberate indifference or gross negligence with respect to the plaintiff's rights.

In August, 1990, the defendants moved for summary judgment on all of the plaintiff's claims. After briefing and argument, Judge Cabranes granted the motion in part. Plaintiff's supervisory and municipal liability claims were dismissed because, in the court's view, insufficient evidence had been adduced to establish all the elements of such claims. Mr. Golino's claims concerning his arrest were

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[2]A default was entered against Joyce Carasone Lupone. She was not involved in the summary judgment motion, and is not a party to this appeal. Ms. Lupone has had a number of surnames during the period material to this action. For the sake of consistency, she will be referred to as Joyce Carasone.

[3]These officers are the petitioners: Robert Lillis, Leonard Pastore, Mary Fish and Anthony DiLullo.

dismissed as time-barred. As to the investigating officers, however, summary judgment on Mr. Golino's malicious prosecution claim was denied "because the record...contains evidence from which a reasonable jury might infer that plaintiff was maliciously prosecuted."[4] 761 F. Supp. 962 (D. Conn. 1991).

The defendants Robert Lillis, Leonard Pastore, Anthony DiLullo and Mary Fish appealed from Judge Cabranes' decision, contending that the district court erred: (1) in concluding that the state court's previous determination of probable cause did not preclude relitigation of that issue in this civil rights action; and (2) in denying summary judgment on the grounds of qualified immunity.

After briefing and argument, the Second Circuit determined first, that "the district court properly ruled that the probable cause decision of Judge Kinney should not be given preclusive effect." 950 F.2d 864, 870 (2d Cir. 1991) (10a). Its rationale was that the district court was correct in determining that, for collateral estoppel purposes, the probable cause hearing entailed "procedural limitations" curtailing Mr. Golino's:

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[4]In Connecticut, the elements for the tort of malicious prosecution are (1) the discharge of the plaintiff; (2) that the prosecution was without probable cause; (3) that it was malicious...In the instant case the plaintiff was acquitted. Malice may be implied from the want of probable cause. But actual malice may be proved to enhance the damages. So that the element in controversy was that the defendant was without probable cause for procuring this prosecution. Probable cause is the knowledge of facts sufficient to justify a reasonable man in the belief that he has reasonable grounds for prosecuting the defendant for the charge complained of. *McGann v. Allen*, 105 Conn. 177, 185 (1926).

> efforts to secure the full and fair litigation of the probable cause issue...Thus, at such a hearing under Connecticut law, the suspect apparently has no right to call any witnesses or to introduce any evidence of his own. Nor did the state court exercise discretion to permit Golino to call witnesses or offer evidence. Rather, he was limited to cross-examining the state's witnesses and submitting a written offer of proof identifying witnesses and evidence he wished to present. Further, in connection with the preliminary hearing, Golino had no access to the police investigative file. As has transpired in the present action, that file contained numerous items of evidence that could have been used to cross-examine the police officers who testified and to create substantial questions about the existence of probable cause to prosecute Golino.
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> Given (a) the substantial showing in the present case that appellants' presentations in support of probable cause contained numerous significant misstatements and omissions, and (b) the limitations on Golino's ability to present his own evidence and to gain access to undisclosed significant facts known to the police in order to cross-examine the state's witnesses, we conclude that the 1984 state hearing did not provide Golino a full and fair opportunity, for collateral estoppel purposes, to litigate the issue of probable cause.

Id. at 869-70 (10a).

Second, as to the qualified or "good faith" immunity question, the Second Circuit determined that given that "the information that was misrepresented or remained undisclosed in appellants' presentations in support of probable cause were not immaterial to that question as a matter of law," and "[g]iven, in addition, the evidence that appellants' non-

disclosure of the exculpatory information was deliberate, the district court properly concluded that it could not rule as a matter of law that it was objectively reasonable for appellants to believe there was probable cause for the arrest and prosecution of Golino. Summary judgment was properly denied." *Id.* at 872 (14a, 15a).

B. Factual Background

Based upon the nature and quality of the evidence available to the police, it seems surprising that the Serra murder remains unsolved. No fewer than six known witnesses saw the killer in the Temple Street garage. Of these, four offered meaningful descriptions. One of the witnesses gave the police a complete and detailed description, and, less than 12 hours after Penny Serra's death, positively identified a suspect, Philip DeLieto, Penny Serra's boyfriend, from a photo array and from a lineup. Chris Fagan, the cashier in the garage, heard the killer speak, and felt that he did not speak fluent, unaccented American English. Mr. Fagan was the only known witness to see the killer in his own car. Although his description of the vehicle was vague and variable, some elements of his description were firm. Mr. Fagan also stated in initial interviews, reiterated in an interview under hypnosis several weeks later, and told to Detective Fish in 1980, that the car had a license plate with a two letter prefix of "MR" followed by four numbers.

In addition to the witness evidence, the police were able to recover at least three readable fingerprints from the Serra car which they strongly suspected belonged to the killer. Based upon blood recovered from the Serra car and from various surfaces in the garage building, the police were also

aware that the killer had type "O" blood. Largely because of Mr. Fagan's statements, the police believed that the killer had suffered a cut to his left hand or arm. The murder weapon, believed to be either a knife or a scissors, was apparently never recovered.

In the months following the murder, the police considered and ruled out numerous suspects. Mr. Golino was not among the suspects at this stage of the investigation. His name first surfaced in a Case-Incident Report (C.I.R.) dated January 8, 1976 by Detective George Mazzacane.[5] Detective Mazzacane reported that information had reached him, via a circuitous route, that Joyce Carasone had stated that her boyfriend, Tony Golino, had said during an argument that he would "do the same thing to her as he had done to Penny down in the garage in New Haven." Detective Mazzacane interviewed Ms. Carasone, who stated that she had been beaten by Mr. Golino on several occasions, but that he had never made any threats regarding Penny Serra. She told Detective Mazzacane that she had known Penny Serra when they were both in high school, but had not seen her since. She did not know whether Tony Golino had ever known Penny Serra. She also told Mazzacane that she had, in fact, made the statement attributed to her concerning the threat, but that it was a lie and she was sorry.[6] Mazzacane concluded that Carasone

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[5]*Joint Appendix* (hereinafter *J.A.*) (filed in the court of appeals) at 310.

[6]*Deposition of George Mazzacane*, p. 29. For reasons unknown to the respondent, the petitioners' *Joint Appendix* to the court of appeals neglected to include relevant deposition transcripts that had been appended to the *Memorandum Opposing Summary Judgment*. Therefore,

was a liar and unreliable.[7]

Following his interview with Carasone, Mazzacane located a fingerprint card for Mr. Golino, and it was determined that his prints did not match those found at the crime scene.[8] Mazzacane testified that he believed, but is not positive, that the police department also eliminated Golino as a suspect in 1976 on the basis of blood type.[9] On the basis of his meeting with Carasone, his follow-up on Mr. Golino's fingerprints, and possibly his blood type, Mazzacane ruled out Mr. Golino as a suspect.

Following her assignment to the Serra investigation in 1979, Detective Fish acquainted herself with the earlier investigative files, reinterviewed various witnesses, and arranged for two of the eyewitnesses who had seen the killer in the garage to be interviewed under hypnosis.[10] Fish was aware of Mazzacane's report on his 1976 interview with Carasone and of Ms. Carasone's reported claims regarding statements made by Tony Golino[11] and therefore wanted to interview him.

The first contact between Detective Fish and Tony Golino occurred on April 9, 1980 when he was interviewed by Fish and Officer Butler. The report of that interview states,

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the brief to the court of appeals, as this brief will do, cites to the original deposition testimony.

[7] *Mazzacane Deposition*, p. 41.

[8] *J.A.:312.*

[9] *Mazzacane Deposition*, p. 13.

[10] *J.A.:313-21.*

[11] *Deposition of Detective Fish*, pp. 409, 489.

in relevant part,[12] that Mr. Golino had been introduced to Penny Serra by a Robert Ranne; that what he principally knew about the Serra murder consisted of rumors that "a DiLieto" had killed her and that an arrest would never take place because of the relation of the alleged killer to Biagio DiLieto, then the Chief of Police; that he remembered July 16, 1973 because it was his younger brother's birthday and there had been a party for him that evening. Mr. Golino also informed the officers that in July 1973 he had been employed at the W.T. Grant Store on Dixwell Avenue in Hamden, Connecticut, where his hours were 9:00 a.m. to 5:00 p.m., that he generally never left the store during the day, had a half hour lunch break, and usually ate in the store cafeteria. He showed the officers a small scar located on his left wrist, and informed them that he had gotten it when he was about nine years old. He also, apparently, told officers that he believed that he had type "O" blood, and that one of the cars owned by various members of the Golino family in 1973 was a blue 1969 Chevrolet Malibu.

On May 6, 1980, Mr. Golino again went voluntarily to the New Haven Police Department and gave a formal statement concerning the Serra case.[13] This covered largely the same ground as the April 9 interview. Golino again stated that he had been introduced to Penny Serra by Robert Ranne, probably in 1968, had known her vaguely, and always in the context of her relationship with Ranne. He had no contact with Serra after he graduated from high school in 1978, but understood that his wife Joyce Carasone Golino

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[12] *J.A.:322-27.*

[13] *J.A.:328-41.*

had been a friend of Serra's and had graduated in the same high school class. He also stated that he did not know his blood type, but believed it to be "the most common blood type, either "O" positive or "O" negative," because he had had a blood test in connection with getting a marriage license. He reiterated the account of having received the scar on his wrist when he was nine or ten years old as a result of a fence climbing accident.

On April 21, 1980, Detective Fish interviewed Joyce Carasone. This interview marks the beginning of a relationship between Ms. Carasone and police investigators which blossomed and gave rise to ever more elaborate and embellished accounts regarding Mr. Golino's involvement in the Penny Serra murder. As noted on Detective Fish's report, Ms. Carasone became hysterical in the course of the initial telephone contact with Fish and implied that she had personal knowledge regarding the identity of the killer. By April, 1980, the vague and distant relationship between Carasone and Serra which was described to Mazzacane in 1976 had become an intimate friendship, and the report contained several references to "her good friend Concetta."[14] She acknowledged to the officers that she was then in the process of a difficult divorce from Tony Golino, implied on several occasions her belief that he was somehow implicated in the Penny Serra murder, and gave an account of what she claimed was a phone conversation with Tony Golino on April 9, 1980, in which she claimed that he told her that the police had questioned him that day and "think I had

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[14]It is striking, although apparently not to Detective Fish, that in the voluminous investigative file of the case virtually no one, and certainly none of Ms. Serra's family or close friends, refers to "Concetta."

something to do with Concetta."

On May 8, 1980, Carasone gave a formal statement to Detective Fish and Officer Butler.[15] In this statement, Carasone once again recounted her close friendship with Serra, both during and after high school.[16] She claimed that Tony Golino knew Penny Serra because, at some unspecified time, "they sat down one time talking like they knew each other." So far as Carasone knew, her intimate friend Penny Serra never dated Tony Golino. Ms. Carasone stated that Mr. Golino had said to her, at unspecified times, that "they would never catch the guy [who'd killed Penny Serra] and he'd have a big smile or smirk on his face as if he knew you [sic] the person did it." Asked about her statement in the April phone conversation with Detective Fish indicating personal knowledge about the killer of Penny Serra, she stated that this indicated her suspicion that Phil DiLieto had been the murderer, claiming that Penny had "definitely" told her that Phil DiLieto "had done her wrong." She denied knowledge of any further information that would be relevant to the investigation and denied knowing who killed Penny Serra.

On July 13, 1983, Joyce Carasone gave another formal

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[15] *J.A.:346-55.* This statement was not signed, however, until August 16, 1983.

[16] Noteworthy, although not to Detective Fish, was first, that Carasone claimed her close friendship with Serra occurred principally over the telephone and second, that in the intensive investigation immediately following Ms. Serra's death, and the interviews of virtually every member of Ms. Serra's family and everyone known to be a friend of hers, Ms. Carasone's name apparently never surfaced.

statement. This time, her memory had greatly improved.[17] Ms. Carasone now recalled, going back to November 1975,[18] numerous instances in which Tony Golino would beat and threaten her, invoking Penny Serra. Apparently having forgotten her previous sworn testimony that Golino and Serra had never dated, Carasone told the police:[19]

> He said to me I'll do the same to you I did to Penny. I said to him, how could you do that, she was a nice girl, and he said, no she wasn't, she was a whore, but he said it, the word whore in an Italian phrase. I then said to him how do you know, did you go out with her and Tony didn't answer me, he just sat there and looked very nervous. I then said you must have done it because you know so much and Tony just laughed at me.

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[17] *J.A.:356-71.* Although the May 1980 and July 1983 statements were actually signed by Ms. Carasone on the same day, August 16, 1983, the inconsistencies and dramatic differences between them, did not, apparently, trouble the petitioners.

[18] Ms. Carasone was then living with Mr. Golino. It was not until January 1977 that she married the, by her account, admitted murderer of her close friend Penny Serra.

[19] There are a number of other anomalous features to this statement by Carasone, including patent inconsistency not only with her earlier statements, but internally as well. For example, Carasone states that she heard about Ms. Serra's death on the radio when she came home from work on July 16, but that she didn't realize for sure that it was the person she knew until she saw her picture in the paper the next day. She then states that Tony Golino called her on the evening of July 16 about the murder and stated that it was awful. Why Ms. Carasone would have felt it particularly noteworthy or awful when, by her own account, she didn't realize it was the same person she knew until the next day, is a matter never pursued by the investigating officers.

In July, 1983, Carasone also remembered that on every anniversary of Serra's death, Golino would laugh at her and tell her that they would never catch the guy who did it. She also recalled a specific episode, heretofore unmentioned, which she claimed had occurred in July, 1977:

> He beat me up and he said "you'll end up like Penny." I said to him "no I won't." Then Tony says yes you will, your [sic] just like her, a whore. I then said to Tony, how could you do such a thing like that? Tony said she was a whore, she was no good, I told Tony, they'll catch you yet. Tony said they'll never catch me and at this time he turned real white and got real nervous and he corrected himself right away and he said they'll never catch the guy who did it. I then said to him, you said me, you did it, Tony says, no, the guy, he covered his statement up.

She also acknowledged that she had denied anything concerning Penny Serra when she spoke with Mazzacane in 1976, but claims to have brought them to Fish's attention in the 1980 interviews. The contemporaneous reports of those interviews contained no mention of these episodes.

Throughout the period between the initial 1980 interviews and Mr. Golino's arrest in July, 1984, the investigating officers were aware that Carasone and Tony Golino were involved in a highly acrimonious divorce and an on-going dispute concerning custody and visitation with their child, Tony, Jr.[20] They were further aware that Carasone had flatly stated that she would get even with Tony, and that she

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[20] *See J.A.:342-45*, the Fish-Butler C.I.R. resulting from the April 21, 1980 interview. *See also Affidavit of Tony Golino, J.A.:426-29.*

would do anything to make sure that he was never again able to see their child.[21]

Joyce Carasone's ever-increasingly detailed and accusatory statements constituted the bedrock upon which Detectives Fish, Pastore, DiLullo and Lillis proceeded and ultimately arrested Mr. Golino. By her own admission, and largely on the basis of the foregoing, Detective Fish had come to regard Tony Golino as the prime, if not the only, suspect by June, 1980, nearly four years before the arrest.[22] This conviction had little dependence on or relation to the evidence. As Detective Fish readily admits, and informs anyone who will listen, she is still firmly convinced that Tony Golino killed Penny Serra, despite indisputable proof that he has a different blood type than the murderer.[23] Detective Fish acknowledged in a deposition that her approach to the evidence was entirely conditioned by her an *a priori* conviction as to Mr. Golino's guilt. When he told her that he believed he had type "O" blood, she believed him because that would tend to inculpate him. When he told her that he did not kill Penny Serra, she believed he was lying because the claim was inconsistent with his guilt.[24]

The petitioners' determination that Tony Golino be

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[21] *Golino Affidavit, J.A.:426-29.*

[22] *Testimony of Detective Fish* at Hearing in Probable Cause, *HPC, August 1984*, p. 863. A review of Detective Fish's C.I.R.'s for the period subsequent to April 1980, discloses virtually no investigative activity directed toward anyone except Tony Golino.

[23] *Fish Deposition*, pp. 45-48; 55-60.

[24] *Fish Deposition*, pp. 109-11.

arrested for the murder of Penny Serra resulted in an arrest warrant affidavit containing material omissions and false statements.[25] As stated by the district court:

> Among other things, the affidavit omitted (1) descriptions of the suspect provided by four witnesses, (2) prior statements of Joyce Carasone Lupone that were inconsistent with statements attributed to her in the affidavit, (3) the full description of the suspect's car as provided by one eyewitness, (4) plaintiff's sister's statements that plaintiff had the scar on his left wrist since childhood, (5) evidence that fingerprints on Ms. Serra's car which were strongly believed to belong to Ms. Serra's killer did not match plaintiff's fingerprints, (6) the fact that investigators had not verified plaintiff's blood type, and (7) the fact that plaintiff was unmarried and lived in New Haven in 1973.
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> There were also several false statements contained in the warrant affidavit including the statements (1) that plaintiff "frequently visited" the W.T. Grant Store in New Haven, (2) that Diana Morrone and Patricia Capone Anderson described an ace bandages on plaintiff's "left wrist," (3) that plaintiff cancelled "all" scheduled meetings with defendants during the investigation, and (4) that Neil Russo, an informant, told police that plaintiff had gone to school with and dated Penny Serra.

761 F. Supp. at 969, n.2 (27a-28a).

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[25] Although the petitioners do not dispute that the arrest warrant affidavit contained several omissions and false statements, they dispute that those omissions and false statements were "material." *District Court Opinion*, 761 F. Supp. at 969, n.2 (27a).

Another omission found by the district court was "the undisputed fact that the arrest warrant affidavit made no mention of the fact that an eyewitness, Gary Hryb, had positively identified another suspect within hours of the murder."[26] *Id.* at 969 (28a).

REASONS FOR DENYING THE WRIT

Because the essence of the issue on certiorari is merely whether there were sufficient facts to sustain both lower courts' determination that summary judgment should not issue, this Court should not grant certiorari.[27] As there were sufficient facts to sustain the lower courts' decisions, the denial of summary judgment was proper.

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[26]Gary Hryb, who was nearly run down by the murderer as he drove the Serra car just after the stabbing, gave the description and, later on the night of July 16-17, positively identified Philip DeLieto, Serra's boyfriend, as the man he had seen in the garage that day. The police ultimately discounted Mr. Hryb's identification, ostensibly because of what was initially characterized as an ironclad alibi for DeLieto and various deficiencies in the lineup and identification procedure. Mr. Hryb continued to stand by the identification and, indeed, felt so strongly about it that he later complained to the State Police about the possibility of some sort of cover-up arising from the fact that the New Haven police refused to act on his information. *See, J.A.:402-03.*

[27]As this Court has previously stated: "we do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

I. THE SECOND CIRCUIT'S DETERMINATION THAT JUDGE KINNEY'S FINDING OF PROBABLE CAUSE IS NOT PRECLUSIVE COMPORTS WITH THIS COURT'S DECISION IN *ALLEN V. MCCURRY.*

The petitioners' theory of collateral estoppel is logically indefensible as it erroneously attempts to correlate the question of due process with the issue of whether a proceeding afforded a "full and fair adversarial determination of probable cause." As a result, the petitioners are requesting this Court to erode the collateral estoppel doctrine and find that as long as minimal due process requirements are met at a prior hearing, collateral estoppel should apply.

In August, 1984, a hearing was held before Connecticut Superior Court Judge Frank Kinney to determine whether there was probable cause for Mr. Golino to be tried for Penny Serra's murder. Mr. Golino was present at the hearing, was represented by counsel, and was allowed to cross-examine the witnesses called by the State. However, in spite of his requests, he was not permitted to call witnesses nor was he allowed access to the police investigative file.[28] At the conclusion of the hearing, Judge Kinney found probable cause.

Petitioners are confusing collateral estoppel with due process: what is a sufficient probable cause hearing under Connecticut law is a separate issue from the question of whether a defendant receives a "full and fair" opportunity to

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[28]This was ultimately turned over at the time trial actually commenced in May 1987. By that time, the State was aware through the blood test administered to Mr. Golino that he could not be the person who killed Penny Serra.

litigate the claim or issue decided by the first court for collateral estoppel purposes. *See Allen v. McCurry*, 449 U.S. 90, 101 (1980), cited in Second Circuit opinion at 869 (9a).

In other words, contrary to the petitioners' view, due process is not the equivalent of, or a substitute for, the "day in court" to which the §1983 plaintiff is entitled. It would be difficult, for example, to claim a denial of due process in the initiation of a prosecution by grand jury indictment. Moreover, it would be equally difficult to argue that by virtue of the grand jury proceedings, the accused had been afforded a "full and fair opportunity" to litigate the issue actually decided, i.e., probable cause.

In fact, the decision of the court of appeals on this issue is merely a straightforward application of *Allen v. McCurry,* which held that collateral estoppel applies only if the prior proceeding allows a "full and fair opportunity to litigate the claim or issue decided by the first court." Here, as Mr. Golino did not have a full opportunity to litigate the issue of probable case at the probable cause hearing, under the mandate of *Allen v. McCurry* collateral estoppel cannot be applied. As the court of appeals correctly found, Mr. Golino did not have a full opportunity to litigate the issue because, in Connecticut, the probable cause hearing process sets procedural limits on a defendant's ability to "secure the full and fair litigation of the probable cause issue." *Second Circuit Decision*, 950 F.2d at 869 (10a).

As the Second Circuit correctly determined, the procedural limits are that a defendant has no right to call his own witnesses nor introduce evidence of his own. A defendant is limited to cross-examining the State's witnesses. Even this right is severely limited as a defendant is not allowed to conduct discovery of the State's investigative file. *Id.* at 870

(10a). As the court of appeals found, having access to the police file could have allowed Mr. Golino to "cross-examine the police officers who testified and create[d] substantial questions about the existence of probable cause to prosecute [him]."[29] *Id.* (10a). If Mr. Golino had been given access to that file prior to the probable cause hearing and had been able to cross-examine police officers about the fabricated evidence at that hearing, probable cause would not have been found.

In their petition, petitioners consistently call the probable cause hearing an "adversarial hearing," presumably based on the fact that the respondent filed an offer of proof with the superior court judge. As the district court correctly held, however, there is simply no authority for the claim that preclusive effect should be given to a judicial determination reached without affording the person against whom preclusion is sought a meaningful opportunity to put on his own evidence as well as cross-examine the witnesses which the State chooses to offer. In ordinary understanding, the term "to litigate" means more than an opportunity to dispute or cross-examine your adversary's evidence. The present petitioners would presumably, and properly, feel aggrieved if their opportunity to put on a case in the trial of this action was foreclosed by the assertion that their interests were adequately protected through cross-examination of Mr. Golino's witnesses.

As the lower courts' decision comports with the prior law of this Court on the issue of collateral estoppel, the present case does not merit review on this issue.

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[29] As the respondent's statement of facts shows, facts later discovered from the State's files show that probable cause never did exist and that certain facts stated in the arrest warrant affidavit were false.

II. THE SECOND CIRCUIT'S DECISION DOES NOT SET DIFFERENT STANDARDS AMONG THE CIRCUITS FOR §1983 ACTIONS BASED ON LACK OF PROBABLE CAUSE TO ARREST AND §1983 ACTIONS BASED ON LACK OF PROBABLE CAUSE TO SEARCH.

The petitioners claim that a finding of issue preclusion in the present case would set a standard differing from the standard for issue preclusion adopted by other circuits in wrongful search and seizure claims. This is not true. None of the cases that petitioners cite in support of this argument directly address what a "full and fair" hearing would entail for search and seizure claims.

In *Searing v. Hayes*, 684 F.2d 694 (10th Cir. 1982), the §1983 plaintiffs were found to have received a full and fair opportunity to litigate the legality of a search warrant, even though not granted an evidentiary hearing, because the plaintiffs had not shown to the court that a *Franks* hearing was warranted. After denial of their suppression motion, the §1983 plaintiffs pled guilty to the charges. They took no appeals from any of the state court judgments, rulings or orders, but instead filed the §1983 action. The facts in *Searing* have no bearing on any issue before this Court.

Neither do the facts in the cases of *Sanders v. Frisby*, 736 F.2d 1230 (8th Cir. 1984) (per curiam) or *Ayers v. Richmond*, 895 F.2d 1267 (9th Cir. 1990), the other two cases cited by the petitioners. In *Sanders*, the issue was whether the doctrine of collateral estoppel could be applied to foreclose a post-conviction civil action which challenged an arrest and search and seizure where there was a judgment of conviction following the actual litigation of the defendant's Fourth

Amendment claims, a reversal of his conviction on *other grounds*, and his plea of guilty on remand. The Eighth Circuit held that the civil rights plaintiff had fully litigated his Fourth Amendment claims at the trial on the merits. The reversal of the conviction on other grounds did not destroy the finality of the trial court's ruling on his Fourth Amendment claims; because there was a trial resulting in a conviction, the Fourth Amendment claims were actually litigated and decided on the merits. In *Ayers*, collateral estoppel could not be applied because the §1983 plaintiff had not exercised his statutory right to appeal the adverse rulings on the Fourth Amendment issue within 30 days of the entry of his guilty plea.

In neither *Searing, Sanders,* nor *Ayers* did the various courts of appeals discuss the requirements of what a "full and fair" hearing would be for collateral estoppel purposes in search and seizure cases. Therefore, the petitioners' claim of inconsistent results in §1983 actions is without basis. This issue does not merit review.

III. THE SECOND CIRCUIT'S DECISION TO DENY SUMMARY JUDGMENT ON THE ISSUE OF QUALIFIED IMMUNITY COMPORTS WITH THIS COURT'S DECISION IN *MALLEY V. BRIGGS*.

A. The Petitioners Are Urging This Court To Adopt A Result Which Does Not Follow From The Decision In *Malley v. Briggs*.

Petitioners request that this Court adopt a new standard that when there has been a state court's finding of probable

cause, the causal chain of liability to the police officers under §1983 is broken even when it is later determined that the arrest warrant contained false statements. Under this standard, police officers who prepare a materially false affidavit would then be held immune from malicious prosecution claims under §1983.

In urging this Court to do this, petitioners rely on *Malley v. Briggs*, 475 U.S. 335 (1986). In that case, the petitioner had argued that since a judge had signed the arrest warrant on the defendant, this, in effect, would break the causal chain of the acts of the officer in preparing a warrant. This Court held, however, that the fact that an affidavit was signed by a magistrate did not necessarily have a bearing on whether "a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id.* at 345. Magistrates make mistakes too and an "officer...cannot excuse his own default by pointing to the greater incompetence of the magistrate." *Id.* at 346, n.9.

Significantly, in *Malley*, respondent made no claims of false or misleading facts in the affidavit; respondent's claim was merely that the facts in the affidavit were insufficient to constitute probable cause. Of course, in the present case there are claims of false statements and omissions in the affidavit. Therefore, the present case presents an even stronger case than *Malley* for non-reliance on a judge's actions after the warrant has been prepared.

The petitioners give no valid reason why this Court should hold that the *Malley* rule that a police officer cannot rely on a judge's determination of probable cause should be different if there has been a one-sided probable cause hearing after the false affidavit has been signed. In the present case,

because the affidavit was false and because the respondent had not been able to conduct discovery of the police files or present testimony, the judge was not presented with a full picture of all the facts establishing the magnitude of the investigatory misconduct and malfeasance. He, therefore, was himself plainly deceived.

Further, the respondent claims that the defendants' conduct continued after Judge Kinney's decision. In addition, even if the petitioners' argument is correct, it goes only to damages, and not to liability. By the time Judge Kinney found probable cause, Mr. Golino had been arrested, incarcerated, publicly branded a murderer and subjected to a lengthy hearing. These are not trivial injuries. Finally, the entire subject of "supervening cause" is a matter to be determined by reference to Connecticut law, a subject on which petitioners are silent.

Petitioners argue that "to the extent the [false and omitted] information was available, it was brought to the attention of the state court during the probable cause hearing." As petitioners admit by this statement, all the false and omitted information was not available to the state court. The information that was available was not presented in true adversarial form because the respondent was not allowed to put on his own witnesses.

The only circuit court case the petitioners cite to in support of their position is *United States v. Martin*, 833 F.2d 752 (8th Cir. 1987), *cert. denied*, 494 U.S. 1070 (1989). Claiming it to be "an analogous case," the petitioners state that *Martin* is support for their argument that the state court hearing on probable case is dispositive of the question. However, as petitioners admit in a footnote, "the affidavit in *Martin* was not alleged to contain falsehoods or exclude

material information." *Brief of Petitioners* at 17. As discussed above, this fact alone shows the cases are not analogous. The *Martin* court specifically states that the result in the case might be different if there had been material false statements or misrepresentations in the affidavit. *Martin* at 755.

Also, "correcting" the affidavit at this point, as petitioners suggest, makes no difference to their argument as the state judge at the hearing did not have the benefit of the petitioners' version of the "corrected affidavit" in front of him. Even if he did, petitioners' argument does not work as the respondent takes issue with the petitioners' version of the corrected affidavit found in the *Reply Brief of Defendants-Appellants* filed with the Court of Appeals on September 4, 1991. This issue does not merit review.

B. The Second Circuit Properly Applied This Court's Test For Qualified Immunity To The Facts Of This Case; Even If This Court Decides To Adopt The *Magnotti* Test, The Second Circuit Made No Error As It Properly Applied That Test To The Facts.

The test for qualified or "good faith" immunity enjoyed by police officers is properly laid out in the court of appeals' decision at pages 870-71 (11a-13a). Therefore, it is unnecessary to fully repeat it here. As the court of appeals correctly noted, a police officer's shield of qualified immunity is lost "where an officer knows, or has reason to know, that he has materially misled a magistrate on the basis for a finding of probable cause, as where a material omission is intended to enhance the contents of the affidavit as support for a conclusion of probable cause." *See* 950 F.2d at 870 (12a) and

cases cited.

As the petitioners note in their petition, the question of probable cause is distinct from (although related to) the question of qualified immunity. (Citing *Magnotti v. Kuntz*, 918 F.2d 364, 367 (2d Cir. 1990). As the district court elaborated,

> There may be circumstances...in which there was not probable cause -- for example, because there was less than sufficient knowledge or information "to warrant a person of reasonable caution in the belief that" plaintiff had committed the offense...but in which the officers are nevertheless qualifiedly immune because it was objectively reasonable for the officers to believe they were not violating plaintiff's rights.... (all citations omitted)

761 F. Supp. at 971 (32a).

Therefore, a court must make two determinations: First, whether there was probable cause to arrest, and if not, whether officers are nevertheless qualifiedly immune because it was objectively reasonable for them to believe they were not violating a plaintiff's rights.

Contrary to petitioners' assertions, the Second Circuit properly applied both parts of the test in reaching its final decision that summary judgment was properly denied by the district court.

On the probable cause issue, as the police officers had argued at the district court and court of appeals level that the omissions and false statements in the affidavit were not

material, and Mr. Golino had argued at both court levels that the false statements and omissions were material, and had stated sufficient facts to put into issue this question, both courts properly found that summary judgment could not be granted on this issue. Even an incomplete examination of the arrest warrant affidavit reveals omissions and inclusions which utterly undermine Judge Higgins' determination of probable cause.[30]

The next step, if a court determines there was not probable cause (or that there is a question of fact whether probable cause occurred), is to determine whether it was objectively reasonable for the officers to believe they were not violating plaintiff's rights. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Magnotti* at 367. The court of appeals properly applied this test, determining that:

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[30] As the court of appeals stated: "viewed in the light most favorable to Golino, the record indicates that appellants deliberately withheld, *inter alia*, the information that most of the eyewitnesses described the killer as thin, whereas Golino at the time weighed 215 lbs.; that most of them described the killer as being clean shaven, whereas Golino at the time had a mustache; that the one eyewitness who said the killer had a mustache immediately positively identified a person other than Golino as the killer, and the man identified turned out to be Serra's boyfriend; that Golino's prime accuser, his former wife (whose extreme bias against Golino was confirmed at the 1984 state hearing), had made statements both inconsistent with those quoted in support of the warrant and recanting those quoted in support of the warrant; that the police had fingerprints which they strongly believed to have been left by the killer, but which did not match the prints of Golino; and that the police knew the blood type of the killer but had declined to test Golino for blood type. 950 F.2d at 871-72 (14a).

> Given...the evidence that appellants' nondisclosure of the exculpatory information was deliberate,[31] the district court properly concluded it could not rule as a matter of law that it was objectively reasonable for appellants to believe there was probable cause for the arrest and prosecution of Golino. Summary judgment was properly denied.

950 F.2d at 872 (15a).

A review of the statement of the facts found in this brief shows that there is sufficient evidence to support the conclusion that nondisclosure of the exculpatory information was deliberate. A review of the arrest warrant in light of the facts known to the police goes far toward proving either malice or, more charitably, almost unbelievable incompetence on the part of the defendants. It contained material falsehoods; it intentionally excluded material and obviously exculpatory information;[32] it distorted and twisted truthful information to intentionally create a misleading picture. Further, there were patent investigative lapses which, although arguably the product of mere negligence, raise legitimate factual issues of malicious intent when considered in the totality of circumstances of this case.

Petitioners somehow are under the impression that the court of appeals misconstrued the law and their argument.

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[31] Note that the court of appeals found that there was sufficient evidence to show a question of fact that the material information was withheld "deliberately." *See* Footnote 30, *supra*.

[32] At his deposition, Detective DiLullo freely conceded that he intentionally omitted exculpatory information as a matter of consistent policy on his part. *DiLullo Deposition*, pp. 203-05.

In essence, petitioners' claim is that the court of appeals did not take into consideration the test stated in the Second Circuit case of *Magnotti v. Kuntz*, 918 F.2d 364 (2d Cir. 1990), to find that "even if probable cause is lacking, the corrected affidavit is still sufficient to sustain a reasonable belief that probable cause existed." (*Petition for Writ of Certiorari* at 19.) As can be seen in the Second Circuit's decision at 871-72 (13a-15a), the court did take into consideration the corrected affidavit to reach its conclusion stated above on the issue of objective reasonableness. Therefore, even if this Court decided to adopt the *Magnotti* test, the court of appeals committed no error. This issue does not merit review.

C. Even If The "Totality Of The Circumstances" Are Looked At, The Second Circuit Properly Denied Summary Judgment On The Issue Of Qualified Immunity.

Lastly, the petitioners urge this Court to determine whether qualified immunity exists by reviewing not only the affidavit itself, but also all of the circumstances surrounding the allegedly illegal arrest.

If petitioners truly want this court to endorse a "totality of circumstances test for objective reasonableness," then this test must be reviewed at the present time in the context of a motion for summary judgment. Petitioners state in their petition the circumstances surrounding the arrest which they apparently allege show the good faith of the officers. The respondent, as can be seen elsewhere in this brief and in the conclusions by both lower courts, raises legitimate factual issues concerning the officers' "bad faith." Because there are facts indicating bad faith on the part of the petitioners,

summary judgment is not proper in this situation. In fact, the appellate court's determination that there was sufficient evidence to determine that the nondisclosure of the exculpatory information was deliberate shows that the court was looking at the totality of the circumstances in determining the issue of objective reasonableness. This issue does not merit review.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED

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